No. 18-15

# In The Supreme Court of the United States

JAMES L. KISOR,

*Petitioner*,

v.

ROBERT WILKIE, ACTING SEC. OF VETERANS AFFAIRS.

*Respondent*.

On Writ of Certiorari to
the United States Court of Appeals
for the Federal Circuit

## BRIEF OF *AMICUS CURIAE* SENATOR SHELDON WHITEHOUSE IN SUPPORT OF RESPONDENT

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*Walmart v. Dukes*, 564 U.S. 338 (2011) ..... 16

*Wood v. McCann*, 6 Dana 366 (1838) ..... 15

**Other Authorities**

3 William Blackstone, *Commentaries on the Laws of England* (1st ed. 1768) ..... 16

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Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2012).....4

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Michael S. Kang, *The End of Campaign Finance Law*, 98 Va. L. Rev. 1 (2012).....19

Nancy MacLean, *Democracy in Chains* (2017).....10

Niccolo Machiavelli, *The Prince* (1532).....3

Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 Law & Soc. Inquiry 955 (2007).....12

Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (2008).....12

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The Federalist No. 78 (A. Hamilton) (C. Rossiter ed. 1961).....5

Theodore Roosevelt, "The Annual Message of the President Transmitted to Congress, December 3, 1907," *Papers Relating to the Foreign Relations of the United States* (Washington, DC: Government Printing Office, 1910) .....6

Theodore Roosevelt, *New Nationalism Speech* (1910)..... .....4

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thing these actors want is a robust, operating democracy that honors the wishes of the people.[8] What they want is political power, and the secrecy to deploy it without accountability.[9]

Congress set up administrative agencies to balance the interests of the public against the self-interest of these powerful forces. In our complex, modern economy, Congress does not have the time to address the multiplicity and variety of issues that come before these agencies; Congress also lacks the expertise to address the complex and often technical questions raised;[10] and Congress is often under too much political pressure to address these questions

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[8] And the stakes can be huge. For example, in the United States alone the fossil fuel industry enjoys an annual effective subsidy of nearly $700 billion, according to the International Monetary Fund. *See Counting the Cost of Energy Subsidies: IMF Survey*, https://www.imf.org/en/News/Articles/2015/09/28/04/53/sonew070215a (last visited February 28, 2019).

[9] The corporate forces operating in politics today are rarely actually the corporations themselves, and more often corporate trade associations, corporate-funded "think-tanks," the billionaires of vast fortunes garnered through corporate success, and an army of front groups designed to obscure the sources of their funding.

[10] *See* J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J. of L. & Pol. 239, 241 (2017) ("[I]t is difficult to legislate in minute detail upon intricate and technical subjects where the body of knowledge is changing and growing by the day. As a practical matter, the legislative process just cannot keep up.").

reliably in the public interest,[11] particularly in the present dark-money-driven, post-*Citizens-United* era.[12]

So Congress built administrative agencies that have both the time and expertise to balance public and private interests knowledgeably; and built into these agencies a bulwark of protections to assure they would do so fairly: statutory direction, congressional oversight, judicial review, procedural transparency, public notice and comment, and rules encouraging sound, fair and evidence-based decision-making.[13]

For decades, it has all worked remarkably well. The challenge presented by this case is a solution in

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[11] *See* Metzger, *Symposium*, *supra* note 2 ("Independent agencies serve a critical role in regulating businesses and marketplaces because they are able to enact reasonable business regulations without political interference or the undue influence of corporate influence."); Sunstein & Vermuele, *supra* note 2, at 321 ("In the absence of a clear congressional direction, courts have assumed that because of their specialized competence, and their greater accountability, agencies are in a better position to decide on the meaning of ambiguous terms. That assumption is correct.").

[12] *See* Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* 206 (2016) (calculating that between 1999 and 2015, as much as $750 million was redistributed through dark-money shell entity DonorsTrust to various conservative causes).

[13] *See* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 Notre Dame L. Rev. 1599, 1604 (2018).

Nevertheless, in academic institutions and think tanks funded by these powerful influencers, a hothouse plant of anti-regulatory theory has been seeded, watered, and fertilized.[16] In political lobbying

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When they do, the consequences can be grave. From the Minerals Management Service, whose failures and shocking behavior led to the oil spill in the Gulf, to the Securities and Exchange Commission, asleep at the switch as financial services companies created exotic financial products that took our economy to the brink of collapse, the fruits of capture can be poisonous. Although too rarely discussed, the economic concept of regulatory capture is well established. From Woodrow Wilson in 1913, through Marver Bernstein, the first Dean of the Woodrow Wilson School at Princeton University in 1955, to Nobel-prize-winning economist George Stigler, to the editorial page of The Wall Street Journal today, Americans from across the political spectrum have recognized its threat. With the stakes as high as they are, it is no wonder that regulated industries make remarkable efforts to affect agencies' decisions.").

[16] *See, e.g.*, Nancy MacLean, *Democracy in Chains* 216, 239 (2017) (giving specific examples of corporate, anti-regulatory forces supporting academics and think tanks in their efforts to undermine economic security or social justice gains and instigate environmental misinformation campaigns); Metzger, *1930s Redux*, *supra* note 2, at 33 ("These academic moves reflect a longer-term and more lasting development. They are part of a wider and decades-old effort to reset constitutional law in a conservative and libertarian direction, reflected in the work of conservative legal groups like the Federalist Society and the Institute for Justice. As that suggests, there is a mutually reinforcing relationship between judicial and academic attacks on the administrative state."); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 Colum. L. Rev. 915, 952–53 (2018) ("And so, the conservative movement began a

## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* is United States Senator Sheldon Whitehouse of Rhode Island. As a legislator and member of the Senate Committee on the Judiciary, *amicus* has a front-row view of both the virtues of America's constitutional democracy and the hazards of growing corporate influence over its democratic institutions, including the judiciary. *Amicus* files this brief to provide some practical, political, and historical context for what is going on in this case.

## SUMMARY OF ARGUMENT

Administrative agencies perform a key role in the constellation of American government, protecting the public from forces of immense political power and influence. They bring a special combination of technical substantive expertise, focused persistence and adaptiveness in face of complex problems, and relative independence from raw political pressure. Obviously, this will annoy forces of influence for whom the deployment of raw political power confers immense advantage. The Court should be wary of

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or his counsel made a monetary contribution to its preparation or submission.

upsetting this decades-old balance to the advantage of those forces of influence. They may prosper by incrementally moving the arena of decision to an overwhelmed, technically inexpert and politically malleable Congress, or to equally inexpert courtrooms, but the public would pay the price.

## ARGUMENT

### This Case Is the Product of a Sustained Effort to Disable Public Interest Regulation That This Court Should Reject.

This case comes before the Court as part of a larger strategy to disable public interest regulation, as a "stalking horse for much larger game."[2] It must

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[2] Cass R. Sunstein & Adrian Vermuele, *The Unbearable Rightness of* Auer, 84 U. Chi. L. Rev. 297, 298 (2017) ("The argument in favor of independent judicial judgment reflects an emerging, large-scale distrust of the administrative state."); *see also* Gillian Metzger, *Symposium: The Puzzling and Troubling Grant in* Kisor, Scotusblog (Jan. 30, 2019), https://www.scotusblog.com/2019/01/symposium-the-puzzling-and-troubling-grant-in-kisor/ ("The court's insistence on taking up a broad challenge to *Auer*, in a case lacking the hallmarks of *Auer* abuse, suggests that its decision to hear *Kisor* is best understood as part of a growing constitutional attack on administrative governance evident in Roberts Court jurisprudence."); *see also* Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017) ("Eighty years on, we are seeing a resurgence of the

be seen in the larger context of the age-old contest between powerful influencers who seek to bend government to their will, and a general public that counts on government to protect it from the influencers.

There is an elemental tension in a democracy (as in other forms of government) between two classes of citizens. One class is an influencer class that occupies itself with favor-seeking from government, and therefore desires rules of engagement that make government more and more amenable to its influence. The second class is the general population, which has an abiding institutional interest in a government with the capacity to resist that special interest influence.[3]

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antiregulatory and antigovernment forces that lost the battle of the New Deal.").

[3] This is a centuries-old tension. *See* David Hume, *Philosophical Works of David Hume* 290 (1854) ("Where the riches are in a few hands, these must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still farther, to the discouragement of all industry."); Andrew Jackson, 1832 Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available in the Yale Law School library) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purpose . . . to make the richer and the potent more powerful, the humble members of society . . . have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of the Government."); Niccolo Machiavelli, *The Prince* ch. IX (1532) ("[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that

The influencer class is no proxy for the public; it has distinct interests, often divergent from the interests of the general population, when it deploys its powers and pressures.[4] There is a need to resist the influencer class because the big influencers stand apart not only in their interests, but also in the power they wield throughout our democratic institutions.[5]

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of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed."); Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* Book V (1748) ("To men of overgrown estates, everything which does not contribute to advance their power and honor is considered by them as an injury."); Theodore Roosevelt, *New Nationalism Speech* (1910) ("[T]he United States must effectively control the mighty commercial forces[.] . . . The absence of an effective state, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power.").

[4] *See* Benjamin I. Page, Larry M. Bartels, & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 Perspectives on Politics 1, 51, 67 (2013) (summarizing results of a study finding that wealthy Americans are much more concerned about budget deficits and much less concerned about job programs, social welfare programs, financial regulation and education programs than other Americans).

[5] *See* Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2012) (explaining that the country's policymakers respond almost exclusively to the preferences of the economically advantaged); Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It* 143-47 (2011) (noting that dependency on donors causes Congress to spend more time on issues that matter to

The Court will hear a lot about separation of powers in this case, but the very purpose of that principle is to protect the public from abuse of government power, including abuse by influencers who seek to control or manipulate that power.[6] In this day and age, the influencers tend to be the big banks and financial houses of Wall Street, the large-scale polluters, and major industries like pharmaceuticals,

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their funders than to the general public); *see generally* Larry Bartles, *Economic Inequality and Political Representation*, Princeton Univ. Dept. of Politics (2002), http://princeton.edu/~piirs/events/PU%20comparative%20Conf%20May%202007/20Gilnes.pdf ("In almost every instance, senators appear to be considerably more responsive to the opinions of affluent constituents than to the opinions of middle-class constituents, while the opinions of constituents in the bottom third of the income distribution have *no* apparent statistical effect on their senators' roll call votes.").

[6] Writing on the intended independence of the judiciary, for example, Hamilton observed that the "independence of judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government . . . ." The Federalist No. 78 (A. Hamilton) (C. Rossiter ed. 1961); *see also Bond v. United States*, 564 U.S. 211, 222, (2011) ("Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well.").

technology and insurance (in earlier days it was mills and railroads—the players change but the game remains the same). Their power can be immense, and has been immense throughout our history.[7] Whether it is a firearms industry seeking to prevent any regulation of its deadly weapons, or a fossil fuel industry protecting its massive pollution, or Wall Street protecting tax favors for its titans, or a pharmaceutical industry defending an island of high U.S. drug prices from world competition, the last

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[7] *See Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 83 (1901) (Harlan, J., concurring in part and dissenting in part) ("[T]he conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country."); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting) ("There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations."); Grover Cleveland, State of the Union address, 1888, American Presidency Project ("Corporations, which should be carefully restrained creatures of law and the servants of people, are fast becoming the people's masters."); Theodore Roosevelt, "The Annual Message of the President Transmitted to Congress, December 3, 1907," *Papers Relating to the Foreign Relations of the United States*, congressional ed vol. 5270, issue 1 (Washington, DC: Government Printing Office, 1910) ("The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a matter of necessity to give to the sovereign—that is, to the Government, which represents the people as a whole—some effective power of supervision over their corporate use.").

search of a problem.[14] As a public official I get virtually zero complaints about the existence of this so-called "administrative state." Indeed, if there is any recurring complaint about administrative agencies it is the well-documented phenomenon of "agency capture," when the regulated industry comes to dominate its supposed regulator and ignore the public interest.[15]

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[14] *See* Metzger, *Symposium*, *supra* note 2 ("The absence of evidence of *Auer*'s supposed ills is par for the course . . . there is little empirical support for the fear that *Auer* will incentivize vague regulations."); Sunstein & Vermuele, *supra* note 2, at 309-10 ("[W]hen ambiguity exists, it is rarely because of *Auer*. After all, few people who are involved in writing regulations think a great deal about *Auer*; many of them have absolutely no idea what *Auer* is . . . . There is a palpable lack of realism, and a lack of empirical grounding, to the widespread concern that *Auer* is a significant part of the constellation of considerations that lead agencies to speak specifically or not . . . . The critics speak abstractly of possible abuses, but present no empirical evidence to substantiate their fears."); *id.* at 312, 318 ("The simplest answer to this question is that there is no problem to be fixed. Nothing is broken."); James Boswell, *The Life of Samuel Johnson, LL.D* 202 (1791) (quoting Samuel Johnson: "Human experience, which is constantly contradicting theory, is the great test of truth").

[15] *See, e.g.*, Michael E. Levine, *Regulatory Capture*, in 3 The New Palgrave Dictionary of Economics and the Law 267, 267 (Peter Newman ed., 1998); Keith Werhan, *Principles of Administrative Law* 7 (2008); *see also* Sheldon Whitehouse, Afterword to Daniel Carpenter and David A. Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (2014) ("As we've seen too often, wealthy and powerful industries can gain excessive influence over regulatory agencies.

groups and industry trade associations funded by these powerful influencers, the hothouse plant is shopped to the public and politicians.[17] And through

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massive institution-building effort across a number of spheres, an effort whose trajectory one might usefully trace from the creation of the Heritage Foundation and the Cato Institute in 1973 and 1977, respectively, through the 1996 launch of the Fox News Channel .... Many of the new think tanks and foundations were the result of an infusion of capital from wealthy, mobilized advocates of deregulation.").

[17] A striking admission of how this big-money fixery works was written by *Business Insider*'s Josh Barro, a Republican who interned for Grover Norquist, worked at the conservative Manhattan Institute for Policy Research, and left the party in disgust over Trump. Just before the 2016 election, Barro wrote: "If [conservatives] look honestly enough, they will realize the conservative information sphere has long been full of lies. The reason for this is that lying has been the most effective way to promote many of the policies favored by donor-class conservatives, and so they built an apparatus to invent and spread the best lies." They have "built a network of think tanks and magazines and pressure groups funded by wealthy donors whose job was to come up with arguments that would sell the donor-class agenda to the masses." Josh Barro, *Fact-Free Conservative Media Is a Symptom of GOP Troubles, Not a Cause*, Business Insider (Oct. 24, 2016). For "donor-class," read influencer class. As conservative commentator and author Jamie Weinstein wrote on election day in 2016: "As for the Republican primary electorate, we learned that perhaps they don't care so much about conservative principles after all—that the conservative movement may be nothing more than a collection of magazines and offices and think tanks in Manhattan and Washington, DC." Jamie Weinstein, *This Election Was a Great Opportunity for Republicans. Instead, the GOP Lies Broken*, The Guardian (Nov. 8, 2016).

amicus groups funded by these powerful influencers, it is shopped to judges and has now been presented to this Court.[18] It is a complete artifice, from beginning to end. And it appears be directed at judges appointed through a political nominations process favoring this view.[19]

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[18] This case is no exception. *Amici* in support of petitioner at both the certiorari and merits stage include many of the Court's frequent flyers—the U.S. Chamber of Commerce, Southeastern Legal Foundation, Pacific Legal Foundation, Washington Legal Foundation, Atlantic Legal Foundation, the Beacon Center, to name a few—backed by (to the extent their funders are known at all) a common set of influential mega-donors. *See generally* Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (2008); Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 Law & Soc. Inquiry 955 (2007); *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) ("The term 'amicus curiae' means friend of the court, not friend of a party. We are beyond the original meaning now; an adversary role of an *amicus curiae* has become accepted. But there are, or at least there should be, limits.").

[19] *See, e.g.*, Jeremy W. Peters, *Trump's New Judicial Litmus Test: Shrinking 'the Administrative State'*, N.Y. Times (Mar. 26, 2018) ("With surprising frankness, the White House has laid out a plan to fill the courts with judges devoted to a legal doctrine that challenges the broad power federal agencies have to interpret laws and enforce regulations, often without being subject to judicial oversight. Those not on board with this agenda, the White House has said, are unlikely to be nominated by President Trump."); Jason Zengerle, *How the Trump Administration is Remaking the Courts*, N.Y. Times Magazine (Aug. 22, 2018) ("The originalists and textualists now favored by

It should go without saying that big, regulated industries with enormous political clout and public-relations savvy may prefer a time-burdened, inexpert, and politically malleable Congress to knowledgeable and patient regulators adherent to rule-of-law principles of fairness and factuality. But for the public, this would be a bad outcome.

There was a time when the United States Supreme Court took the health of America's polity seriously, and affirmatively sought to defend the integrity of the political process. To the question whether the Court bears any responsibility for the health of the American body politic or is merely a bystander when corruption rears its head, the Court's answer was once evident in word and deed. Over and

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the Federalist Society and the Trump administration are decidedly disinclined to defer to executive-branch agencies, whether it's the Environmental Protection Agency or the Food and Drug Administration or the Occupational Safety and Health Administration, when it comes to interpreting arguably (and often necessarily) ambiguous statutes about the environment or public health or workplace safety . . . . Gorsuch is said to have risen to the top of Trump's Supreme Court list in large part because of a 2016 concurring opinion he wrote as a judge on the United States Court of Appeals for the 10th Circuit, in which he forcefully attacked what's known as "Chevron deference."); Robert Barnes & Steven Mufson, *White House counts on Kavanaugh in battle against 'administrative state'*, Wash. Post (Aug. 12, 2018) ("'Judge Kavanaugh protects American businesses from illegal job-killing regulation,' the memo [from the White House] said. 'Judge Kavanaugh helped kill President Obama's most destructive new environmental rules.'").

over, the Court's concerns with corruption entwined with the potentially malevolent political influence of large corporate forces—as recently as Justice Marshall's recognition in *Austin v. Michigan Chamber of Commerce* that "[c]orporate wealth can unfairly influence elections."[20]

The Court once had a particular awareness of the dangers to honest governance posed by massive corporate forces.[21] The Court then saw clearly that

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[20] 494 U.S. 652, 660 (1990). Indeed, in case after case through the early 19th century, the Court sought to defend the political system from "personal or any secret or sinister influences." *See Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. 314, 335-36 (1853) ("[A]ny attempts to deceive persons entrusted with the high functions of legislation by secret combinations . . . or to create or bring into operation undue influences of any kind, have all the injuries of a direct fraud on the public."); *see also Trist v. Child*, 88 U.S. 441, 451 (1874) (citing to *Baltimore & Ohio Railroad Co.* and other cases as representative of existing precedent and consensus in U.S. courts that "tainted" contracts must be void as against public policy).

[21] To demonstrate the gravity of the danger of corruption threatened by undue corporate influence, the Court once provided a striking example: "If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous." *Trist v. Child*, 88 U.S. at 451. This outcome, the Court warned, would be "vicious" and "to be condemned," presenting "evils of . . . sufficient magnitude to invite the most serious consideration." *Id.* The Court once

bringing "the combined capital of wealthy corporations" to bear on government could produce "universal corruption."[22] To protect against this, the Court condemned "[i]nfluences secretly urged under false and covert pretenses," and forbade any scheme of "high contingent compensation" of agents seeking legislative gains.[23] The link between money, secrecy, influence and corruption was plain, and its consequences were seen by the Court to be drastic for democracy: "[s]peculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every state, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome -- *omnae Roma venale*."[24]

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recognized "the great corporations of the country" as the very exemplars of the hazards of political mischief and the intrusion of "the combined capital of wealthy corporations" into politics as the gilded pathway to "universal corruption." *Id.* at 451-52.

[22] *Baltimore & Ohio Railroad Co.*, 57 U.S. at 335.

[23] *Id.*

[24] *Id.*; *see also Rose v. Truax*, 21 Barb. 361, 373 (N.Y. Gen. Term. 1855) ("public policy demands that her legislators . . . discharge the important trusts and duties committed to them independently, uninfluenced by any illegitimate or sinister agencies"); *Harris v Roof's Executor*, 10 Bar. 489, 495, 1851 WL 5268 (N.Y. Gen. Term. 1851) ("It can be neither necessary or proper for the legislature to be surrounded by swarms of hired retainers of the claimants upon public bounty or justice."); *Wood v. McCann*, 6 Dana 366, 369 (1838) ("[T]he Legislature should be perfectly free from any extraneous influence which may either

In recent years, this Court's jurisprudence has massively shifted power to the forces of influence. For instance, the Court has protected these great powers from exposure to courtrooms and juries, the elements of the American system of government specifically set up to check their powers of influence.[35]

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corrupt or deceive the members, or any one of them."); *Shippinger v. Hepbaugh*, 5 Watts & Serg. 315, 1843 WL 5037, at *14 (Pa. 1843) (noting that influences "privately and secretly exerted . . . operate deleteriously on legislative action"); *Fuller v. Dame*, 18 Pick. 472, 486 (Mass. 1836) (discussing issues surrounding attempt to keep certain agreements "secret" from the individuals who would be impacted by the agreement).

[35] Unique in the constitutional constellation, the jury is designed not just to protect the individual against government, but also to protect the individual against other "more powerful and wealthy citizens"; the jury box is designed to frustrate the influencers, and to offer a refuge when the influencers have had their way with the other branches of government. 3 William Blackstone, *Commentaries on the Laws of England* 380 (1st ed. 1768); *see also* Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times (Oct. 31, 2015); Alexis de Tocqueville, *Democracy in America* 311 (Arthur Goldhammer trans., Penguin Putnam 2004) (1838) (describing the jury as "one mode of popular sovereignty"). Recent decisions, however, have empowered giant corporations through mandatory arbitration to shunt plaintiffs away from civil juries. The Court has opened the door for giant corporations to contractually debar customers from pursuing class actions. In various employment discrimination cases, the Court has steadily whittled away the rights of corporate employees. *See, e.g., Vance v. Ball State Univ.*, 570 U.S. 421 (2013); *Univ. of Texas Southwestern Med. Center v. Nassar*, 570 U.S. 338 (2013); *Walmart v. Dukes*, 564 U.S. 338 (2011); *AT&T Mobility LLC v.*

The Court has also made it nearly impossible to prosecute any but the most obvious, immediate and amateurish efforts at political corruption, which widens the lane for forces of influence to work their will with money, threats, and promises without fear of legal consequence.[26]

If that were not enough, the Court has opened America's political system to unlimited political spending, which, in turn, opened up unlimited anonymous political spending, and which empowered the obvious corollary to unlimited political spending:

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*Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center, West, Inc., v. Jackson*, 561 U.S. 63 (2010); *Gross v. FBL Financial Servs., Inc.*, 556 U.S. 167 (2009); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

[26] *See, e.g.*, *Citizens United v. FEC*, 510 U.S. 310, 359 (2010) ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."); *McCutcheon v. FEC*, 134 572 U.S. 185, 207-208 (2014) ("Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance."); *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (vacating the conviction of a former Virginia Governor in a case involving allegations of a *quid pro quo* arrangement where the former Governor's constituent gave the Governor and his family over $175,000 of value in gifts and loans in exchange for giving the constituent access to top Virginia government decision-makers). Some relationships may be so sordid that they merit condemnation as corruption under the criminal law, yet not be reachable under this Court's narrow definition limiting corruption to precisely '*quid pro quo*' transactions where the payee is the actual decision maker.

promises and threats of unlimited political spending.[27] This drives political power to a narrow array of forces that have both the means and the desire to spend unlimited political money (the forces rationally least deserving of special solicitude in America's political contests).[28]

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[27] "Citizens United has unleashed a wave of campaign spending that by any reasonable standard is extraordinarily corrupt," and "has turned campaign finance into a system . . . even more ethically unmoored than the one obtained before Watergate . . . . The difference now is that the checks are bigger." Thomas B. Edsall, *After Citizens United, a Vicious Cycle of Corruption*, N.Y. Times (Dec. 6, 2018).

[28] In many of these cases, *amici* also present in this case were urging these results. Their funding is not disclosed because the Court's transparency rule is helpless at ferreting out who the real parties in interest are behind "front" *amici*, but there is every reason to believe that it is the big influencers mentioned above who funded those efforts and are funding this effort, too. In this regard, the statement in *McCutcheon* that "those who govern should be the *last* people to help decide who *should* govern," *McCutcheon*, 572 U.S. at 192 (emphasis added), is sadly blinkered. It stands on no evident constitutional footing but seems rooted in opinion; it deprecates the work of the Founders to create a balanced, self-correcting, elected republic, and their confidence that in a healthy republic good people would come forward to serve; it overlooks the role of the voter in putting out of office "those who govern" who displease them; and it is bad political theory, as it overlooks the pernicious role of big and powerful special interests. Indeed, if one wanted to seek who the last should be to decide who should govern, it is at the junction of economic power and predatory political purpose that one should look. In any practical world, allowing Big Oil or Big Pharma, masked, to decide who should govern is a far worse

Against the onslaught of the corporate influencer class, knowledgeable, patient and independent administrative agencies stand as an important public safeguard—a safeguard overseen by Congress and checked by judicial review. While critics of administrative deference argue that it allows agencies to set policy without adequate process or constraint, none of these concerns is present in this case, where even the Trump administration urged this Court to deny review. At some point, the Court must recognize the contest between forces of vast political influence, and a general public that needs government agencies to defend it from those forces. One of the bulwarks of that defense has for decades been administrative agencies diligently serving the public interest, to the sometime annoyance of the regulated industry.

For the first time in its history, the Supreme Court is "completely devoid of a single individual who has ever participated in electoral politics."[29] The result has been seriously flawed assumptions about the consequences of its decisions, and findings that experience has proven to have been clearly erroneous.[30] I hope this brief is helpful to the Court,

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scenario—but it is where this Court's election law decisions have led us.

[29] Edsall, *supra* note 27 (quoting Professor Sanford Levinson and Fred Wertheimer).

[30] *See Citizens United*, *supra* note 26; Michael S. Kang, *The End of Campaign Finance Law*, 98 Va. L. Rev. 1, 36–37 (2012)

("What has happened since *Citizens United* . . . is not new regulation—it is the rollback of existing regulation. Instead of a hydraulics of campaign finance regulation, we are seeing a reverse hydraulics of campaign finance deregulation . . . . The reverse-hydraulic effects for the 2010 elections were clear. First, independent expenditures exploded upward in 2010 by more than 300 percent compared to the previous midterm elections in 2006. They increased from less than $75 million total in 2006 to roughly $300 million in 2010. Second, independent expenditures by outside groups in particular increased dramatically."); *Shelby County v. Holder*, 570 U.S. 529 (2013); Joel Heller, *Shelby County and the End of History*, 44 U. Mem. L. Rev. 357, 389–90 (2013) ("The proposition that officials in formerly covered jurisdictions might push forward with potentially problematic voting policies without evaluating their potential to abridge the right to vote finds support in the actions of Texas officials in the immediate aftermath of the Shelby County decision. Within minutes of the Court's announcement of its decision striking down the coverage formula, Texas Attorney General Greg Abbott announced via Twitter that the state's controversial photo-identification law, which the Department of Justice had refused to preclear, would go into effect immediately. With only somewhat less alacrity than their counterparts in Texas, officials in other states began implementing similarly controversial voting policies in the months after the Shelby County decision"); Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, The Atlantic (July 10, 2018) ("The results [of *Shelby County*] have been predictable. Voter-identification laws, which experts suggest will make voting harder especially for poor people, people of color, and elderly people, have advanced in several states, and some voting laws that make it easier to register and cast ballots have been destroyed. For many of the jurisdictions formerly under preclearance, voting became rapidly more difficult after the *Shelby County* decision, particularly for poor and elderly black people and Latinos.").

given its dearth of practical experience in the rough and tumble of massive political forces seeking power.

## CONCLUSION

For the foregoing reasons, the Court should dismiss the case as improvidently granted or affirm the Federal Circuit's decision.

Respectfully submitted,

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